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Supreme Court of the United States

No. 168 —OCTOBER TERM, 1948

THE CITY OF NEW YORK,
Petitioner,

against

LEWIS H. SAPER, as Trustee in Bankruptcy of SPOTLIGHT PRODUCTIONS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—Beekman 3-0580—1948

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Supreme Court of the United States

No. —October Term, 1948

The City of New York,

Petitioner,

against

Lewis H. Saper, as Trustee in Bankruptcy of Spotlight Productions, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Supreme Court of the United States:

The petition of the City of New York respectfully shows:

1. Your petitioner is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

2. The respondent is the trustee in bankruptcy of Spotlight Productions, Inc., Bankrupt, in a bankruptcy proceeding pending in the United States District Court for the Southern District of New York, Docket No. 83203.

Statement of Matter Involved

3. In said bankruptcy proceeding your petitioner duly filed a claim as a priority claim for taxes due from the bankrupt for New York City sales taxes in the sum of $495.81, and for New York City business taxes in the sum

of $19.72, with interest upon the principal of said taxes at 1% per month up to the date of payment thereof (R. 14-17)* as provided by your petitioner's tax laws.

4. The respondent moved to expunge the said claim (R. 19-24). After a hearing before Honorable John E. Joyce, Referee in Bankruptcy, the motion was denied and the claim allowed in full as a priority claim under § 64a(4) of the National Bankruptcy Act, together with interest on the principal sum of such taxes to the date of payment at the rate of 1% per month (R. 73, 84-85).

5. Upon respondent's petition for review, the District Court dismissed the petition and affirmed the Referee's order in all respects (R. 106-111).

6. Upon appeal by the respondent to The United States Circuit Court of Appeals for the Second Circuit, that Court reversed the order of the District Court to the extent that that order allowed interest on your petitioner's tax claim beyond the date of filing of the petition in bankruptcy, January 5, 1944, and in all other respects affirmed the order of the District Court (R., p. 49).

7. The Circuit Court held that by virtue of amendments made by the Chandler Act (52 Stat. 840) to § 57n and § 64a of the National Bankruptcy Act, interest was allowable upon tax claims in bankruptcy proceedings only until the date of the filing of the petition in bankruptcy. Your petitioner seeks to have this Court review the decision of the Circuit Court on this point.

Jurisdiction and Timeliness

8. The petition is made under 28 U. S. C. A. § 347, subd. (a), and the Court has jurisdiction to grant the writ. *City of New York* v. *Feiring, Trustee in Bankruptcy,*

* References are to folios of the Record unless otherwise indicated.

313 U. S. 552 (1941); *City of New York v. Goldstein, Trustee in Bankruptcy*, 299 U. S. 522 (1937).

9. The decision of the Circuit Court of Appeals was handed down on May 25, 1948, and the order thereon was entered on the same day. This petition is, therefore, timely.

10. The record remains in the custody of the Clerk of the United States Circuit Court of Appeals for the Second Circuit. Issuance of the mandate was stayed by the Court pursuant to Rule 31 of that Court.

Statutes Involved

11. The New York City sales taxes here involved were imposed pursuant to the Administrative Code of the City of New York, Chapter 41, Title N, and the business taxes were imposed pursuant to the provisions of the Administrative Code of the City of New York, Chapter 41, Titles R and RR. Each of said Titles of the Administrative Code has a provision imposing penalties and interest in case of failure to file a return or to pay taxes due as required. The provision in Title N of Chapter 41 (sales tax) reads as follows (Adm. Code, § N41-17.0, subd. a):

> "*Penalties and interest.*—a. Any person failing to file a return or to pay or pay over any tax to the treasurer within the time required by this title shall be subject to a penalty of five percentum of the amount of tax due; plus interest at the rate of one percentum of such tax for each month of delay excepting the first month after such return was required to be filed or such tax became due; but the comptroller or as provided in section N41-13.0, the treasurer if satisfied that the delay was excusable, may remit all or any part of such penalty, but not interest at the rate of six per cent per year. Such penalties and interest shall be paid and dis-

posed of in the same manner as other revenues from this title. Unpaid penalties and interest may be enforced in the same manner as the tax imposed by this title."

The corresponding provision of Title R and Title RR of the Administrative Code (business tax) is practically identical. (See Adm. Code, § R41-14.0, subd. a and § RR41-14.0, subd. a.)

12. The provisions of the National Bankruptcy Act relied on and referred to in the opinion of the Court below, §§ 57j, 57n, 63a and 64a (11 U. S. C. A. §§ 93j, 93n, 103a and 104a, respectively), as they read both before and after the Chandler Act are set forth in Appendix A, *post*, pages 12-21.

Opinions Below

13. In addition to the opinions of the Circuit Court and the District Judge in this case, attention is also directed to the opinion of the Circuit Court in the case of *Carter, Trustee in Bankruptcy* v. *United States of America and State of New York*, —— F. (2d) ——, decided at the same time, which involved the same question as here presented. The opinion in the *Carter* case is set forth in full in Appendix B, *post*, pages 22-25.

(a) The District Court sustained the Referee's order which had allowed interest on petitioner's tax claim to the date of payment. On this point, the District Judge (Coxe, D. J.), stated in his opinion (R. 103-105) that such holding was in accord with the general rule laid down in *In re Meinst & Co.* 290 F. 947 (C. C. A. 2, 1923), modified on other grounds *sub nom. United States* v. *Childs*, 266 U. S. 304 (1924). He found no merit in the respondent's contention that the Chandler Act amendments to §§ 57n and 64a of the Bankruptcy Act had the effect of stopping interest on tax claims upon filing of the bankruptcy petition (R.

103), and found no clear evidence of a congressional intent to alter the general rule (R. 105). Concerning the amendment to § 57n he said (R. 103-104):

> "Sec. 57n as amended simply substitutes a statutory bar to the filing of governmental claims for a court made bar. It is designed, so far as relevant and tempered by the provision for extension, to subject such claims to the same requirements as to filing as other claims and to speed up closing of estates. Senate Report No. 1916 on H. R. 8046, 75th Cong. 3d Sess. (1938)."

He pointed out also that § 64a as amended provides, as did the former § 64b, that priority debts, which included taxes, should "be paid in full" before payment of dividends to creditors (R. 104), and that the provision of § 57j requiring the allowance of government debts with interest accrued thereon had not been changed (R. 105). He cited *Davie* v. *Green*, 133 F. (2d) 451 (C. C. A. 1, 1943) in support of his position.

(b) The Circuit Court (L. HAND, SWAN, CLARK, C. JJ.) reversed the District Court, holding in substance that the Chandler Act amendments to §§ 57n and 64a had the effect of placing tax claims on a par with other debts. In its opinion (R., pp. 42-49), the Court acknowledged that before the Chandler Act the general rule had been to allow interest upon tax claims at the statutory rate to the time of payment, citing *inter alia* its own decisions, *In re Menist & Co.*, *supra*, and *In re Semon*, 11 F. Supp. 18 (D. C. Conn., 1935) modified on other grounds 80 F. (2d) 81 (C. C. A. 2, 1935). The Court stated further, however, that § 64a and § 57n as amended by the Chandler Act treat tax claims the same as other debts and concluded that tax claims thereby became "provable debts" under § 63a, which allows interest only to the date of filing of petition (R., pp. 45-46). The Court said (R., p. 46):

"* * * Thus it is apparent that the Act, as it now stands, treats the tax claim as a debt and the United States as a creditor which, like other creditors, must make proof of claim on a form prescribed by the Supreme Court. This, then, took from tax claims their former favored position where no proof or other governmental action was necessary for their enforcement. Thenceforth they must be proved, or otherwise be barred, just like other debts of the bankrupt.

We see no reason to suppose that this did not place tax claims in the same situation as other debts with respect to interest also."

(c) *Carter, Trustee etc.* v. *United States, et al., supra,* involving the same question was decided at the same time as the instant case by a panel of Judges of the Circuit Court for the Second Circuit consisting of A. H. HAND, CHASE, CLARK, C. JJ. Of the Court as thus constituted, A. H. HAND and CHASE, C. JJ., in an opinion by the former, disagreed with the views of the Court in the present case, saying (Appendix B, *post*, at pp. 22-23):

"Judge Chase and I * * * think that interest on tax claims should be allowed to the date of their payment under the settled ruling of the federal courts prior to the enactment of the Chandler Act in 1938—a ruling which we do not regard as changed by anything in that Act. We have however, decided to acquiesce in the contrary decision of this court on this question in *Saper* v. *City of New York*, F. 2 , decided May 25, 1948, which represents the view of the majority of the five judges who have been concerned in *Saper* v. *City of New York* and the case at bar with the issue here involved. Such a mode of dealing with the appeal before us will settle the law in this circuit as to the allowance of interest on tax claims unless the Supreme Court should hereafter reach a different conclusion. However, we feel it advisable to state in more detail our personal views, which are in accord with those of the First Circuit in *Davie* v. *Green*, 153 F. 2d 451."

This opinion is set forth in full in Appendix B, *post*, pages 22-25. The views therein expressed are in substance the same as those expressed by COXE, D. J., in the case at bar.

Question Presented

14. The question presented is whether under the National Bankruptcy Act as amended by the Chandler Act, interest is payable on tax claims to the date of payment of such claims, as was the rule prior to the Chandler Act, or whether interest is to be allowed on tax claims only to the date of filing of the petition in bankruptcy.

15. Your petitioner contends that the Chandler Act amendments upon which the Court below relied did not in fact, and were not intended to, change the substantive rights of tax claimants or the status of tax claims in bankruptcy proceedings, or the rule with respect to the interest to be allowed on such tax claims for the following reasons: (a) Under the National Bankruptcy Act after the Chandler Act as before that Act, "taxes legally due and owing by the bankrupt" continued to be entitled to be paid in full in advance of payment of dividends to creditors, as a priority debt of substantially the same degree (§ 64a); continued to be non-dischargeable by bankruptcy proceedings (§ 17) and thereby retained their vitality under the laws pursuant to which imposed including accrual of interest for non-payment; and continued to be allowable with "such interest as may have accrued thereon according to law" (§ 57j). (b) The amendment to § 57n relied on by the Circuit Court effected, and was intended to effect, only a procedural change in respect of the proof and allowance of tax claims by substituting a prescribed statutory procedure and time limitation in place of the prior procedure which required this to be done by Court order.

Assignment of Errors

16. The petitioner submits that the Circuit Court erred: (a) in holding that the amendments made by the Chandler Act to § 57n and § 64a of the National Bankruptcy Act had the effect of altering the law with respect to the status of tax claims and the interest to be allowed on tax claims against bankrupts, and placing such claims in the same situation as ordinary debts with respect to interest; (b) in failing to hold that interest is allowable on your petitioner's tax claim to the date of payment thereof by the trustee in bankruptcy; (c) in reversing the decision of the District Court so far as it allowed interest on your petitioner's tax claim to the date of payment of said claim, and in allowing interest on the claim only to the date of the filing of the petition in bankruptcy.

Reasons for Allowance of the Writ

17. The decision of the Circuit Court herein is in conflict with the decision of the Circuit Court of Appeals for the First Circuit on the same point. See *Davie* v. *Green*, 133 F. (2d) 451 (1943).

18. There is a disagreement among the Judges within the Circuit Court of Appeals for the Second Circuit who have considered the question here presented in two cases which came before that Court. *Cf.* opinion in case at bar (R., pp. 42-49), with opinion in *Carter, Trustee, etc.* v. *United States et al., supra* (Appendix B, *post*, pp. 22-25).

19. The question is of considerable importance in the administration of bankrupt estates and until settled by this Court will tend to cause confusion and uncertainty in the administration of bankrupt estates. Moreover, as the Court below has said (R., p. 43), the question affects all tax claims

in bankruptcy, not merely those of the City of New York, but of the Federal government and of any State or subdivision thereof.

20. The decision below, it is respectfully submitted, contravenes the nearest applicable decisions of the Circuit Court of Appeals for the Second Circuit, as well as of this Court, rendered on the question prior to the enactment of the Chandler Act. See *In re Menist & Co., supra*, modified on other grounds *sub nom. United States* v. *Childs, supra; In re Semon, supra.*

21. The case represents an important question of federal bankruptcy law which has not been passed upon by this Court since the amendment of the National Bankruptcy Act by the Chandler Act, but which should be passed upon by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding the said Circuit Court to certify and send to this Court on a day certain therein to be designated a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals for the Second Circuit in this case, being No. 267 on its calendar for the October Term, 1947, to the end that the case may be reviewed and determined in this Court as provided in 28 U. S. C. A. § 347, and that the said final order of the said Circuit Court of Appeals for the Second Circuit in this case to the extent that it determines and directs the reversal of the order of the District Court herein so far as it allows interest on your petitioner's tax claim after the filing of the petition in bankruptcy on January 5, 1944 and directs that interest on your petitioner's tax claim be allowed only to the date of filing petition may be reviewed by this Court, and the said determination and order

of the Circuit Court of Appeals for the Second Circuit to the extent indicated may be reversed, and the determination of the District Court herein allowing interest on your petitioner's tax claim herein to the date of payment thereof after the filing of petition in bankruptcy may be reinstated, and a mandate be issued directing that your petitioner's claim be allowed with interest thereon to the date of payment thereof; and your petitioner prays for such other and further relief as to this Court shall seem just and equitable; and your petitioner will ever pray.

New York, N. Y
July 15, 1948

THE CITY OF NEW YORK,
Petitioner,

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Appendix A

Pertinent Provisions of the National Bankruptcy Act

BEFORE THE CHANDLER ACT

Section 57 j

Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

Section 57 n

Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: Provided, That the right of infants and insane persons without guardians without notice of the proceedings, may continue six months longer.

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Appendix A

Pertinent Provisions of the National Bankruptcy Act

As Amended by the Chandler Act

Section 57j

Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

Section 57n

Except as otherwise provided in this title, all claims provable under this title, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: *Provided, however,* That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or subdivision thereof: *Provided further,* That, except in proceedings under chapters 10, 11, 12, and 13 of this title, the right of infants and insane persons without guardians, without notice of the bankruptcy proceedings, may continue six months longer: *And provided further,* That a claim arising in favor of a person by reason of the recovery by the trustee from such person of money or property, or the avoidance by the trustee of a lien held by such person, may be filed within thirty days from the date of such

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Appendix A

Pertinent Provisions of the National Bankruptcy Act

Before the Chandler Act

Section 63a

Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of a petition in an action to recover a provable debt; (4) founded upon an open account, or upon

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Appendix A

Pertinent Provisions of the National Bankruptcy Act

As Amended by the Chandler Act

Section 57n (Continued)

recovery or avoidance, but if the recovery is by way of a proceeding in which a final judgment has been entered against such person, the claim shall not be allowed if the money is not paid or the property is not delivered to the trustee within thirty days from the date of the rendering of such final judgment, or within such further time as the court may allow. When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case.

Section 63a

Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) costs taxable against a bankrupt who was at the time of the filing of the petition by or against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a probable

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Appendix A

Pertinent Provisions of the National Bankruptcy Act

Before the Chandler Act

Section 63a (Continued)

a contract, express or implied; (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments; (6) founded upon an award of an industrial accident commission, or other commission, body or officer, of any State or Territory having power or jurisdiction to make awards as workmen's compensation in case of injury or death for injury prior to adjudication; (6½) the amount of any damages, as evidenced by a judgment of a court of competent jurisdiction, in any action for negligence instituted prior to adjudication of defendant in such action in bankruptcy and pending at the time of the filing of petition in bankruptcy, whether voluntary or involuntary; *Provided,* That the provisions of this clause (6½) shall apply to estates that were pending on June 7, 1934, and are in process of settlement; and (7) claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date: *Provided,* That the court shall scrutinize the circumstances of an assign-

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Appendix A

Pertinent Provisions of the National Bankruptcy Act

As Amended by the Chandler Act

Section 63a (Continued)

debt; (4) an open account, or a contract express or implied; (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments; (6) an award of an industrial-accident commission, body, or officer of any State having jurisdiction to make awards of workmen's compensation in case of injury or death from injury, if such injury occurred prior to adjudication; (7) the right to recover damages in any action for negligence instituted prior to and pending at the time of the filing of the petition in bankruptcy; (8) contingent debts and contingent contractual liabilities; or (9) claims for anticipatory breach of contracts, executory in whole or in part, including unexpired leases of real or personal property: *Provided, however,* That the claim of a landlord for damages for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after bankruptcy, plus an amount equal to the unpaid rent accrued, without acceleration, up to such date: *And provided further,* That in the case of an assignment of any such claim for damages, the court shall, in determining the amount thereof, examine the circumstances of

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Appendix A

Pertinent Provisions of the National Bankruptcy Act

BEFORE THE CHANDLER ACT

Section 63a (Continued)

ment of future rent claims and the amount of the consideration paid for such assignment in determining the amount of damages allowed assignee hereunder: *Provided further,* That the provisions of this clause (7) shall apply to estates pending on June 7, 1934, in which the time for filing such claims has not expired.

Sections 64a and 64b

(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: *Provided,* That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

(b) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered

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Appendix A

Pertinent Provisions of the National Bankruptcy Act

As Amended by the Chandler Act

Section 63a (Continued)

the assignment and the consideration paid or to be paid therefor, and may allow the claim of the assignee in such amount, subject to the provisions of the foregoing proviso of this clause (9), as will be fair and equitable.

Section 64a

The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary fund and for the referees' expense fund; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) wages, not to exceed $600 to each

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Appendix A

Pertinent Provisions of the National Bankruptcy Act

BEFORE THE CHANDLER ACT

Sections 64a and 64b (Continued)

for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary and involuntary cases, as the court may allow; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses of such creditors in opposing such composition; (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of the proceeding, not to exceed $600 to each claimant; (6) taxes payable under paragraph (a) hereof and (7) debts owing to any person who by the laws of the States or the United States is entitled to priority: *Provided*, That the term "person" as used in this section shall include corporations, the United States and the several States and Territories of the United States.

Appendix A

Pertinent Provisions of the National Bankruptcy Act

As Amended by the Chandler Act

Section 64a (Continued)

claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under this title, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof; *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and (5) debts owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: *Provided, however*, That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy.

Appendix B

Carter, Trustee, etc. *v.* United States *et al.*

Opinion of the Circuit Court of Appeals for the Second Circuit

AUGUSTUS N. HAND, *Circuit Judge*:

An involuntary petition in bankruptcy was filed against Union Fabrics, Inc., on December 20, 1939. The United States and the State of New York filed tax claims, asking for interest to the date of payment of the claims. The referee overruled the objections of the trustee to the payment of interest on these claims beyond the date of the filing of the petition in bankruptcy and allowed such interest. The referee thereafter reopened the proceeding for the purpose of hearing a further objection by the trustee, based upon certain alleged equitable considerations, but sustained objections to this evidence and made an order to that effect. Upon a petition for review, the district judge reversed the orders allowing interest on the claims to the date of payment, and sustaining objections to the trustee's offer of proof at the rehearing. He held that interest on the tax claims should be treated in the same manner as interest on other claims and not allowed beyond the date of the filing of the petition. In respect to the evidence offered to show a long delay in the administration of the estate, he regarded such equitable considerations, if pertinent to the determination, as sufficiently shown by the records of the court to augment other reasons for the denial of interest.

Judge Chase and I do not agree with the decision of the court below and think that interest on tax claims should be allowed to the date of their payment under the settled ruling of the federal courts prior to the enactment of the Chandler Act in 1938—a ruling which we do not regard as changed by anything in that Act. We have however decided

to acquiesce in the contrary decision of this court on this question in *Saper* v. *City of New York*, F. 2d , decided May 25, 1948, which represents the view of the majority of the five judges who have been concerned in *Saper* v. *City of New York* and the case at bar with the issue here involved. Such a mode of dealing with the appeal before us will settle the law in this circuit as to the allowance of interest on tax claims unless the Supreme Court should hereafter reach a different conclusion. However, we feel it advisable to state in more detail our personal views, which are in accord with those of the First Circuit in *Davie* v. *Green*, 133 F. 2d 451.

It is not disputed that prior to the Chandler Act taxes bore interest down to the date of payment. This was decided under the provisions of Section 57-j of the Bankruptcy Act, by this court in *In re J. Menist*, 290 Fed. 947, and its determination as to the duration of the period for which interest was to run against bankrupt estates was followed without discussion by the Supreme Court in *United States* v. *Childs*, 266 U. S. 304, though this very question was raised in the arguments of counsel as reported. This rule remained unchanged prior to the passage of the Chandler Act in spite of the fact that in 1926 Section 64-a was amended to alter the absolute priority of taxes theretofore existing as compared with various other preferred claims. *Cf. Horn* v. *Boone County, Neb.*, 44 F. 2d 920 (C. C. A. 8); *In re Semon*, 11 F. Supp. 18 (D. C. D. Conn.), modified on other grounds, 80 F. 2d 81 (C. C. A. 2).

The Chandler Act amendments broadened Section 57(n), 11 U. S. C. A. § 93(n) to include "all claims of the United States" and required them to "be proved and filed in the manner" there provided; it also deleted Section 64(a), 11 U. S. C. A. § 104(a) requiring "the trustee to pay all taxes legally due and owing," but made no substantial change; if

any, in the order of priorities. However only a minor verbal change, not pertinent to this appeal was made in Section 57(j), 11 U. S. C. A. § 93(j); indeed, that is the only change in this section since the Bankruptcy Act of 1898.

As we have already observed, prior to the Chandler Act the governments' claims to interest on taxes down to the date of payment was clear under a settled interpretation of the bankruptcy statute. We need not discuss the question whether governments do well to obtain any priorities over their citizens in payment of taxes, but priorities are given by statute and we think should not be modified by doubtful implication. We agree with Judge Woodbury's opinion in *Davie* v. *Green*, *supra*, that Congress would not have made such a far-reaching change as would result by reversing these prior interpretations without clear and specific enactment. As we have noted, only a minor alteration, irrelevant to this question, was made in Section 57-j by the Chandler Act, though the settled meaning of that section must have been known to the Congressional Committees and many other fundamental changes were made when the bankruptcy law was being thoroughly revised by that Act. Further, if there had been any intention to alter the settled meaning of Section 57-j we think it would have been made evident by Congressional reports and debates, and the federal and state governments would not have been deprived of important priorities by means of a conjectural interpretation. The apparent absence of such evidence of legislative intention seems to us to argue for sustaining the prior judicial interpretation of the section rather than for any new meaning.

It is argued that since Section 57(n) requires that tax claims must be proved and filed like other claims and they are classified as debts in Section 64(a), they are subject to the ordinary rule applied to other claims that in-

terest runs only to the date of the filing of the petition in bankruptcy. But the requirement for filing proofs of tax claims was primarily to facilitate the prompt and orderly administration of bankrupt estates and to enable the trustee safely to distribute assets with exact knowledge of all claims by preventing the representatives of governments from inordinately delaying presentation of their tax claims while interest thereon was still running. It is true that in *United States* v. *Roth*, 164 F. (2d) 575, we allowed a trustee in bankruptcy to set off against a tax claim a mutual indebtedness of the government. However, in that opinion we allowed the set-off which, as compared with an alternate judicial remedy of suit in a district court or the Court of Claims, we a procedural rather than a substantive matter, and we regarded this result as indicated by the order of the Supreme Court prescribing forms of filing, which expressly referred to set-offs against the claimant. This decision does not lead to the conclusion that tax claims, though they must now be proved as ordinary debts, should be reduced in the amount of their recovery from the estate by the elimination of interest subsequent to the date of the petition in bankruptcy. Indeed, we return to the conclusions of the First Circuit that so fundamental an alteration of settled rights as to the incidence of tax claims should have much stronger support than the analogy of the treatment of other claims.

As heretofore stated and in spite of the contra views expressed in this opinion the orders of the District Court are affirmed upon the authority of *Super* v. *City of New York*, *supra*.

CLARK, *Circuit Judge* (concurring): I concur in the result.